Nos. 08-1498 and 09-89

IN THE SUPREME COURT OF THE UNITED STATES

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Petitioners,
v.
HUMANITARIAN LAW PROJECT, ET AL.,
Respondents.

HUMANITARIAN LAW PROJECT, ET AL.,
Cross-Petitioners,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. The Center's litigation program aims to use its empirical research and experience with criminal justice and prosecution practices to assist with important criminal justice cases in state and federal courts. The Center regularly comments on issues of broad importance in criminal law, including on issues involving the exercise of prosecutorial discretion to enforce federal statutes.

The Center files this *amicus* brief in support of the United States to illustrate and reinforce the importance to national security of broad inchoate and facilitation liability under federal criminal law, including under the material support to terrorism statute at issue here, 18 U.S.C. § 2339B. If upheld, the Ninth Circuit's decision would strip prosecutors of a tool that has proven essential to depriving terrorist organizations of support necessary to advance their violent missions. Furthermore, as explained below, the criminal justice system includes multiple safeguards to protect First Amendment rights in indi-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief, and the Court's docket reflects this consent.

vidual prosecutions. Section 2339B, in short, is neither vague nor overbroad, but rather is a necessary means through which federal prosecutors—subject to multiple checks and balances inside and outside courtrooms—protect the nation from further terrorist attacks.

BACKGROUND

In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, Congress provided the Executive Branch with a twofold means to prevent and prosecute support for terrorist activity that often escaped pre-existing federal criminal law. The Secretary of State became empowered to designate a group as a "foreign terrorist organization" ("FTO"), 8 U.S.C. § 1189(a)(1)(A)-(C), and Congress also made it a crime knowingly to provide or attempt to provide "material support or resources" to an FTO or an organization engaged in terrorist activity, 18 U.S.C. § 2339B.

Federal law defines "material support or resources" as

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

Id. §§ 2339A(b)(1), 2339B(g)(4).

In the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, Congress explained that "training" means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). "[E]xpert advice or assistance" is "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* § 2339A(b)(3). The term "service" is not defined by statute.

The Humanitarian Law Project ("HLP") wishes to support the nonviolent and lawful activities of two FTOs, the Kurdistan Workers Party and the Liberation Tigers of Tamil Eelam. HLP argues that it cannot determine whether its desired support would run afoul of the prongs of the "material support or resources" definition barring "service," "training," "expert advice or assistance," and "personnel." Accordingly, HLP contends that these aspects of Section 2339B are unconstitutionally vague and overbroad.

While rejecting HLP's overbreadth challenge, the Ninth Circuit agreed with aspects of HLP's vagueness challenge, holding that the terms "service" and "training," as well as the "other specialized knowledge" component of the definition of "expert advice or assistance," are impermissibly vague. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009). The court—though stating that HLP had not brought a facial vagueness challenge to Section 2339B—reasoned that "it is easy to imagine protected expression that falls within the bounds of the term 'service,'" "other specialized knowledge covers every conceivable subject," and "training could still

be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 929-30.

The Center agrees with the Solicitor General that Section 2339B is neither unconstitutionally vague nor overbroad and thus the Ninth Circuit's ruling should be reversed in part.

SUMMARY OF ARGUMENT

Preventing terrorism requires thwarting plots and starving terrorist organizations of the resources necessary to fund their violent missions. All elements of national power, including federal criminal law, contribute to this effort. Indeed, broad inchoate and facilitation liability are essential to the successful prevention and deterrence of terrorism. Particularly important are forms of criminal liability that operate on the front-end to stop individuals from executing planned acts of terrorism and to curtail the flow of essential resources to terrorist organizations. The Department of Justice relies on these means to stay a step ahead of terrorists and thus to remain proactive in its efforts to protect the nation.

Section 2339B exists for this exact purpose—to preclude individuals from providing certain enumerated forms of support to FTOs. The statute filled a significant gap in pre-existing law and thereby equipped the Department of Justice with a way to prevent the flow of resources to terrorists. As the public record shows, federal prosecutors frequently have employed Section 2339B across many cases to curtail support to al Qaeda and other terrorist groups. It is essential to America's continued security that federal prosecutors remain able to use Section 2339B to stop and hold accountable individuals who provide support to terrorists who threaten our national secu-

rity. The Ninth Circuit's ruling eliminates key aspects of Section 2339B on strained and unpersuasive reasoning.

Reversing the Ninth Circuit's flawed ruling does not risk applications of Section 2339B that will punish protected speech and conduct. To the contrary, the criminal justice system has sufficient safeguards and mechanisms in place to protect First Amendment rights. Not only does Department of Justice policy require senior independent review and approval of all charging decisions under Section 2339B, but defendants also have well-established processes available to them in federal court to challenge applications of the statute that they believe violate their First Amendment rights.

On this score, defendants can move to dismiss an indictment and thereby invoke judicial scrutiny to assess whether particular applications would infringe upon defendants' First Amendment rights. So, too, are defendants entitled to a jury instruction informing the jury that it cannot return a guilty verdict if it finds (under standards explained by the court) that defendants engaged in protected speech or conduct. In addition, the law permits a defendant, at the close of the government's evidence or upon return of a guilty verdict, to ask for a judgment of acquittal on the ground that it would violate his First Amendment rights to permit entry of a guilty verdict on the record before the court. As yet another protection, a defendant may appeal an adverse jury verdict on First Amendment grounds. These processes are sufficient to protect First Amendment rights in Section 2339B prosecutions. Beyond that, an individual can eliminate any risk of prosecution in the first instance by first vetting the planned support to an FTO with

the Secretary of State and receiving her approval under 18 U.S.C. § 2339B(j).

ARGUMENT

I. THE MATERIAL SUPPORT STATUTES ARE ESSENTIAL TOOLS TO PREVENT TERRORISM.

The attacks of September 11, 2001 made plain the devastating consequences of international terrorism. The United States responded with military force and a commitment at all levels of government to a robust strategy of prevention and deterrence of terrorism by thwarting terrorist plots and holding terrorists and their enablers accountable for their actions.

Continued success depends in part upon the Department of Justice's continued use of all means available in the Federal Criminal Code to prevent and respond to terrorist acts. On the response side, numerous statutes, ranging from terrorism-specific offenses to more general offenses such as money laundering or narcotics trafficking, enable the Department of Justice to prosecute and punish individuals who have engaged in completed acts of terrorism or activity connected to terrorist plots. The pinnacle objective is not response, however, but rather prevention. In the wake of September 11, the nation committed to a multifaceted preventative strategy, which relies in part upon the Department of Justice's robust enforcement of certain provisions of federal criminal law designed to address conduct at the initial, formative stages of terrorist plots, before planning turns to violence.

The prime example of a form of criminal liability that operates in a preventative dimension is con-

spiracy liability. The investigation and prosecution of conspiracy enable the Department of Justice to halt terrorist plans in advance of an attack by removing key players in a plot and exposing others. In describing traditional conspiracy liability, this Court emphasized these same tenets:

> The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed. Criminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventive action.

United States v. Feola, 420 U.S. 671, 694 (1975) (internal citation omitted); *see also United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) (explaining that "the law of conspiracy [compared to attempt] is much more preventive, aiming to nip criminal conduct in the bud before it has the chance to flourish into more ominous behavior").

While traditional conspiracy liability is critical to the successful prevention of acts of terrorism, it does not permit federal prosecutors to focus on individuals who lack the mental state necessary to commit or aid a terrorist act but who nonetheless provide important support to terrorist organizations. This precise shortcoming of conspiracy liability—its limited ability to stymie mere preparatory stages of terrorism by choking off financial resources and human capital to terrorists—is what ultimately led to

the material support statute challenged here, Section 2339B.

Congress passed the first of two material support laws, 18 U.S.C. § 2339A, as part of the Violent Crime Control and Law Enforcement Act of 1994. *See* Pub. L. No. 103-322, § 120005(a). Section 2339A makes it a crime to, among other things, provide "material support or resources" or to conceal or disguise the "nature, location, source, or ownership" of material support or resources in connection with an enumerated list of violent crimes. 18 U.S.C. § 2339A(a). The enactment requires proof that an individual "know[s] or intend[s] that [the material support or resources] are to be used in preparation for, or in carrying out" those crimes. *Id.*; *see also Humanitarian Law Project*, 552 F.3d at 927 (explaining that Section 2339A requires proof of specific intent to further illegal activities of an organization through the provision of material support or resources).

Section 2339A is therefore similar to longstanding federal offenses creating accomplice and inchoate liability, which have been interpreted to require knowledge or intent in connection with a specific criminal act. *See, e.g.*, *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) ("To support a conspiracy conviction, the government must show both an agreement and a specific intent to achieve some unlawful goal."); *United States v. Newman*, 490 F.2d 139, 142 (3d Cir. 1974) ("[T]he aiding and abetting statute, 18 U.S.C. § 2, has been construed to require a specific intent to bring about a criminal act.")

Despite the long history of federal inchoate and accomplice liability, and the enactment of Sec-

tion 2339A to create direct facilitation liability just two years earlier, Congress continued to see a gap in the criminal counterterrorism arsenal. In particular, the mental state requirements of conspiracy liability and material support liability under Section 2339A presented difficult barriers to curtailing the flow of resources to terrorist organizations. *Cf.* Roth et al., Nat'l Comm'n on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing: Staff Report to the Comm'n* (2004), at 31-32, *available at* http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf (explaining that "[b]efore the [1996] enactment of this statute, prosecuting a financial supporter of terrorism required tracing donor funds to a particular act of terrorism–a practical impossibility"). Nowhere did the Federal Criminal Code expressly proscribe the indirect facilitation of terrorism—*i.e.*, facilitation without proof of knowledge or intent to commit a specific act of terrorism—through the provision of resources to terrorist organizations.

Accordingly, after extensive hearings, Congress determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." Pub. L. No. 104-132, § 301(a)(7) (emphasis added); *cf. Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."), *cert. denied*, 130 S. Ct. 458 (2009). Thus came the 1996 enactment of Section 2339B as part of AEDPA.

Section 2339B, unlike Section 2339A, does not require knowledge or intent that the "material support" facilitate an unlawful act. Rather, as the Ninth Circuit correctly recognized, under Section 2339B the government need prove only that the defendant knew that that organization receiving particular support is designated as an FTO or that such organization has engaged or engages in terrorist activity. *See Humanitarian Law Project*, 552 F.3d at 925. In this way, then, Section 2339B—unlike traditional conspiracy liability or Section 2339A—empowers the Department of Justice to intervene much earlier on the criminal continuum and thereby prevent the flow of essential resources to an FTO presenting risks to our national security.

II. THE DEPARTMENT OF JUSTICE HAS FREQUENTLY AND SUCCESSFULLY USED SECTION 2339B IN MANY CASES FOLLOWING THE SEPTEMBER 11 ATTACKS.

Federal prosecutors have made extensive use of the material support laws to disrupt and prevent terrorist plots. Indeed, the Department of Justice has described the material support statutes as "one of the cornerstones of [its] prosecution efforts." Counterterrorism White Paper, Counterterrorism Section, Dep't of Justice (June 22, 2006) at 14, *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf; *see also* September 11, 2008 DOJ Fact Sheet #08-807: Justice Department Counterterrorism Efforts Since 9/11, *available at* http://www.justice.gov/opa/pr/2008/September/08-nsd-807.html (last visited Dec. 19, 2009) (emphasizing that Section 2339B "form[s] a critical component of the [DOJ's] overall terrorist prosecutorial efforts,

allowing prosecutors to target the provision of support, resources and other assistance to terrorists and to intervene during early stages of terrorist planning").

As the Solicitor General explains, since 2001, approximately 150 defendants have been charged with, and 75 defendants convicted of, violating Section 2339B. *See* Resp't Br. 53. Another source reports that "the two material support charges [§ 2339A and § 2339B] account for 71% of all convictions under the core terrorism statutes." The Center on Law & Security, New York University School of Law, Terrorist Trial Report Card: September 11, 2008, *available at* http://www.lawandsecurity.org/publications/Sept08TTRCFinal.pdf (last visited Dec. 19, 2009); *see also* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, at 28, Human Rights First (May 2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (reporting, on the basis of a compilation of cases, that "[b]y far the most commonly charged substantive offenses in our data set [of terrorism-related convictions] are the material support statutes").

By way of specific example, individuals successfully prosecuted under Section 2339B include:

- American John Walker Lindh, who pleaded guilty to Section 2339B and other charges for fighting alongside the Taliban in Afghanistan. *See generally United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).
- A group of men from Buffalo, New York, known as the "Lackawanna Six," who pleaded guilty to violating Section 2339B for their par-

ticipation in an al Qaeda affiliated training camp. *See generally* Press Release, Dep't of Justice, Examples of Terrorism Convictions Since September 11, 2001 (June 23, 2006), *available at* http://www.justice.gov/opa/pr/2006/June/06_crm_389.html.

- Uzair Paracha, who was convicted of violating Section 2339B for helping an al Qaeda member obtain immigration documents to permit his re-entry into the United States to carry out terrorist attacks. *See id.*

- Iyman Faris, who pleaded guilty to violating, among other statutes, Section 2339B, for providing material support to al Qaeda in the form of information about targets within the United States. *See id.*

The Department of Justice continues to reaffirm the importance of Section 2339B with new and significant prosecutions, including these pending cases announced in recent months:

- Chicago resident David Coleman Headley faces charges for violating, among other statutes, Section 2339B for his alleged involvement in the 2008 attacks in Mumbai, India, which killed 170 people. *See generally* Press Release, Dep't of Justice, Chicagoan Charged with Conspiracy in 2008 Mumbai Attacks in Addition to Foreign Terror Plot in Denmark (Dec. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-nsd-1304.html.

- Ten individuals have been indicted for violating Section 2339B, among other statutes, for allegedly providing weapons and stolen and counterfeit currency to Hezbollah. *See general-*

ly News Release, U.S. Immigration and Customs Enforcement News, Indictment Charges 4 with Conspiracy to Support Hezbollah 6 Others Charged with Related Crimes (Nov. 24, 2009), *available at* http://www.ice.gov/pi/nr/0911/091124philadelphia.htm.

The Department of Justice's robust past and present reliance on Section 2339B demonstrates the statute's importance to the Executive Branch's ongoing efforts to combat and prevent international terrorism.

III. FEDERAL CRIMINAL PRACTICE PROVIDES SAFEGUARDS TO PROTECT DEFENDANTS' FIRST AMENDMENT RIGHTS IN SECTION 2339B MATERIAL SUPPORT PROSECUTIONS.

Reversing the Ninth Circuit's holding will not leave defendants facing Section 2339B charges without means to protect their First Amendment rights. To the contrary, there are certain mechanisms in place in federal practice to provide sufficient assurance that protected speech and conduct does not lead to criminal liability in individual prosecutions. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 622 (1973) (stating that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied") (citation omitted).

Congress understood this point and took care in enacting Section 2339B to reinforce the message by expressly stating that the statute shall not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States." 18 U.S.C. § 2339B(i). A beginning point, then, must be this Congressional vision that Section 2339B and the

First Amendment are fully capable of coexisting in the Executive Branch's ongoing efforts to thwart the flow of material support to FTOs.

Evidencing its understanding of and adherence to this precept, the Department of Justice has established mechanisms to require advance review and approval of charging decisions related to international terrorism matters proposed by a particular United States Attorney. *See* Dep't of Justice, U.S. Attorneys' Manual Title 9, Criminal Resource Manual § 9-2.136, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.136 (last visited Dec. 19, 2009). With respect to charges brought pursuant to the material support (and other terrorism-related) statutes, "*[p]rior express approval* of the Assistant Attorney General of the National Security Division (AAG) or his designee" must be obtained to "fil[e] a criminal complaint or information or seek[] the return of an indictment." *See id.* § 9-2.136H.

At the very least, these approval processes help to ensure proper applications of Section 2339B, as prosecutors and other Department of Justice officials are duty bound to respect and uphold the constitutional rights of defendants. To be sure, difficult cases may arise that press the outer boundary of the relationship between Section 2339B and the First Amendment. If the government chooses to move forward with charges in such a case, ample means exist for defendants to challenge the charging decision.

Rule 12 of the Federal Rules of Criminal Procedure permits defendants believing that particular criminal charges infringe upon their First Amendment rights to move to dismiss those charges. *See*

Fed. R. Crim. P. 12(b); *United States v. Syring*, 522 F. Supp. 2d 125, 128-35 (D.D.C. 2007) (conducting a First Amendment analysis in connection with a motion to dismiss an indictment under Rule 12); *see also United States v. Bly*, 510 F.3d 453, 459 (4th Cir. 2007) (affirming the denial of a motion to dismiss an indictment raising a potential First Amendment issue). Indeed, defendants' ability to move to dismiss an indictment on the ground that the charged conduct is protected by the First Amendment is commonplace enough that the United States Attorneys' Manual provides a sample response to such a motion. *See* Dep't of Justice, U.S. Attorneys' Manual Title 8, Civil Rights Resource Manual § 8.142, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title8/cvr00142.htm (last visited Dec. 19, 2009).

A motion to dismiss is of legal significance, as it triggers judicial scrutiny of specific charges and thus an independent assessment by the trial judge of whether a conviction under the precise allegations at issue would impermissibly criminalize protected speech. The recent prosecution of attorney Lynne Stewart in New York demonstrates the point. An indictment alleged, among other things, that Stewart violated Section 2339B by providing material support in the form of "communications equipment" and "personnel" to convicted terrorist Sheikh Omar Ahmad Ali Abdel Rahman, known as the "Blind Sheikh." *See United States v. Sattar*, 272 F. Supp. 2d 348, 357 (S.D.N.Y. 2003). Stewart moved to dismiss those charges on the ground that the application of Section 2339B to her was unconstitutionally vague and thus risked criminalizing protected speech. The district court agreed and dismissed the charge on an as-applied basis. *See id.* at 361.

While Stewart ultimately was convicted under a separate material support statute, 18 U.S.C. § 2339A, among other statutes, the case provides apt illustration of a defendant using a motion to dismiss to challenge specific charges on constitutional grounds. Other cases reinforce the same point—that a mechanism exists for defendants to challenge applications of the material support statutes that they believe infringe upon their First Amendment rights. *See, e.g., United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 168 (E.D.N.Y. 2008) (upholding an indictment that charged the defendant with violating Section 2339B against a motion to dismiss based on a First Amendment defense because the defendant was "not being charged with *mere association*"); *United States v. Warsame*, 537 F. Supp. 2d 1005, 1013-16 (D. Minn. 2008) (same); *accord United States v. Afshari*, 426 F.3d 1150, 1161 (9th Cir. 2005) (reversing trial court's dismissal of indictment on First Amendment grounds).

Yet another safeguard exists within the trial itself in that a criminal defendant is entitled to a jury instruction on a First Amendment defense if there is sufficient evidence for a reasonable jury to find in his favor on that defense. *Cf. Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."); *see also United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996) ("A First Amendment defense is warranted if there is evidence that the speaker's purpose or words are mere abstract teaching of the moral propriety of opposition to the [challenged] law.") Indeed, a defendant is able to request that the trial

judge instruct the jury on the basic contours of the defendant's First Amendment rights and, more specifically, that it must acquit the defendant if it finds that the challenged conduct in fact is protected speech.

In an opinion by then-Judge Kennedy, the Ninth Circuit explained that where the trial record contains "some evidence" that "the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury's consideration." *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985). In *Freeman*, the Ninth Circuit reversed particular convictions because, "[i]n light of [defendant] Freeman's defense and the evidence to support it, an instruction based upon the First Amendment should have been given to the jury." *Id.* at 552.

Courts have applied these teachings in recent terrorism prosecutions. For example, in *United States v. Rahman*, the Second Circuit explained that

> Judge Mukasey properly protected against the danger that [the defendant] might be convicted because of his unpopular religious beliefs that were hostile to the United States. He explained to the jury the limited use it was entitled to make of the material received as evidence of motive. He instructed that a defendant could not be convicted on the basis of his beliefs or the expression of them--even if those beliefs favored violence.

189 F.3d 88, 118 (2d Cir. 1999). Likewise, the jury was provided an instruction about protected conduct in the prosecution of Manhattan criminal defense attorney Lynne Stewart. In relevant part, the instruction provided:

> Expression of opinion alone, opinion in the sense of a point of view, even an opinion advocating violence, is not a crime in this country. The United States Constitution guarantees that people may advocate the use of force, or even the moral necessity for a resort to force and violence, without fear of punishment by the government so long as that advocacy is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. But evidence of defendant Lynne Stewart's statements on political, public or religious issues may be considered by you if you find them relevant [as evidence of the purpose of her actions and whether she acted in accordance with her opinions].

Transcript of Judge's Instructions and Charge to the Jury, *United States v. Sattar*, No. S102CR395, 2005 WL 6177268, at *21 (S.D.N.Y. Jan. 12, 2005).

As these cases demonstrate, a so-called protected conduct jury instruction—especially applied against the independent constitutional requirement of proof beyond a reasonable doubt—operates to provide important and sufficient protection of First Amendment rights in Section 2339B prosecutions. *Cf. United States v. Williams*, 128 S. Ct. 1830, 1846

(2008) (emphasizing that "close cases" should be addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt").

Another protection for defendants exists in the form of a judgment of acquittal, including under Rule 29 of the Federal Rules of Criminal Procedure. The Rule and federal criminal practice generally permit a judgment of acquittal at the close of the government's evidence or after an adverse jury verdict. Through this means, a defendant can trigger additional judicial scrutiny of First Amendment issues by arguing that there is insufficient evidence to sustain a conviction because the "material support" allegedly provided to an FTO was "protected speech" for which he may not be prosecuted. *See e.g.*, *United States v. Sattar*, 395 F. Supp. 2d 79, 99-103 (S.D.N.Y. 2005), *aff'd*, No. 06-5015, 2009 WL 3818860 (2d Cir. Nov. 17, 2009, amended Dec. 23, 2009); *Taleb-Jedi*, 566 F. Supp. 2d at 168 (stating that "should the Government not deliver on its representation of what the evidence will show, and the proof at trial shows mere association, the Government's case may not be allowed to go to the jury or any guilty verdict based on mere association may be set aside"). Notably, Rule 29 itself permits a trial judge to address such First Amendment concerns *sua sponte*. *See* Fed. R. Crim. P. 29(a) ("The court may on its own consider whether the evidence is insufficient to sustain a conviction.")

As yet another protection, defendants may appeal an adverse jury verdict on First Amendment grounds. *See, e.g.*, *Rahman*, 189 F.3d at 116-18 (rejecting defendant's First Amendment defense in affirming his conviction); *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) (rejecting the defendant's First Amendment defense to Section

2339B conviction on plain error review because "§ 2339B does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated FTO") (emphasis in original), *vacated on other grounds*, 543 U.S. 1097 (2005); *see also Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (reversing convictions upon finding that "[t]he ordinance before us makes a crime out of what under the Constitution cannot be a crime"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (reversing a communist party member's conviction for violating the Smith Act and instructing that the act must be construed to prevent a defendant from being "punished for his adherence to lawful and constitutionally protected purposes").

Noteworthy, too, as a protective mechanism is the one Congress provided in Section 2339B(j). This provision allows individuals desiring to provide particular support to an FTO to eliminate any risk of prosecution by first vetting the planned support with the Secretary of State and receiving her approval. *See* 18 U.S.C. § 2339B(j). HLP provides no indication in its brief that it has attempted to avail itself of this safeguard.

IV. THE NINTH CIRCUIT'S REASONING IS FLAWED AND WOULD SIGNIFICANTLY LIMIT NECESSARY COUNTERTERRORISM EFFORTS.

The Ninth Circuit's decision, as the Solicitor General's brief demonstrates, confused and misapplied established vagueness and overbreadth doctrine in invalidating Section 2339B. Indeed, it is difficult to read the Ninth Circuit's vagueness reasoning and not conclude that the court was searching (in ways akin to facial analysis of a statute) for hypothetical unconstitutional applications of Section

2339B. Not only does this approach offend this Court's teachings regarding proper vagueness and overbreadth analysis, it also runs afoul of important constitutional avoidance principles. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (outlining constitutional avoidance principles). The canon of constitutional avoidance takes on added importance where, as here, vagueness and overbreadth challenges arise in the national security setting—an area where respect for legislative prerogatives should be at its apex. *Cf. Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.")

The Ninth Circuit's decision raises more than legal doctrinal concerns. The decision threatens elimination of the Department of Justice's ability to prosecute individuals for providing a "service," "training," or "expert advice or assistance" in the form of "specialized knowledge" to an FTO. Furthermore, the ramifications of the Ninth Circuit's holding extend beyond Section 2339B to Section 2339A, as both provisions largely depend upon the same definitions challenged here by HLP.

If permitted to stand, the Ninth Circuit's decision risks grave consequences to the Executive Branch's ongoing efforts to deprive FTOs of resources requisite to their violent missions. Section 2339B is unique in the Federal Criminal Code because it permits the Executive Branch to stop the flow to FTOs of seemingly innocuous or facially neutral resources, which are capable of being provided without knowledge or intent to facilitate a specific terrorist

act. This stoppage, in turn, prevents terrorists from reallocating funds to further terrorism, either because the resource is fungible or because it has multiple potential applications.

Under the Ninth Circuit's ruling, the cases falling beyond the ambit of Section 2339B, or at the very least called into serious question, would be many. FTOs could receive services, training, or expert advice or assistance with respect to the following:

- flying of airplanes and driving trains;
- design of large metropolitan subway systems, including their ventilation apparatus;
- distribution of food, water, and electricity in large urban areas;
- protocols of the United States Secret Service;
- construction, storage, and transport of mass shipping containers; or
- survival techniques.

With respect to each example, it is possible to suggest circumstances in which the support would not be connected to a particular terrorist plot, but rather to a purported innocuous purpose, such as increasing the emergency and disaster preparedness of a community for which an FTO serves as the *de facto* government; improving the distribution of essential humanitarian resources; advancing the development of critical infrastructure in a particular geographic location; or strengthening certain security measures. On the other hand, it is far easier to take each example and instantly envision the same conduct being undertaken to further a specific terrorist plot. Section 2339B exists to avoid the latter risk: Congress

put the statute in place to prevent international terrorist organizations from receiving particular forms of support capable of turning lethal before the Department of Justice is able to step in with a preventative prosecution.

Even the provision of the following less specific forms of support could raise grave national security concerns in particular circumstances:

- language translation;
- internet use;
- mechanical repairs;
- long-range photography and videography; or
- physical fitness and self-defense.

In each instance, the support at issue—while perhaps intended to aid an FTO's non-violent activity—is also capable of being used to advance the FTO's violent mission. These forms of support, as with many others, have dual uses and are sufficiently fungible to warrant Congressional prohibition in the name of protecting our national security.

The irony of the Ninth Circuit's ruling is that the court itself, in the course of rejecting HLP's overbreadth challenge, best summed up the grave consequences of curtailing the intended reach of Section 2339B: "Were we to restrain the government from enforcing section 2339B(a) that prohibits individuals in the United States from providing 'material support or resources' to [FTOs], we would potentially be placing our nation in danger of future terrorist attacks." *Humanitarian Law Project*, 552 F.3d at 932. These risks are real and persistent. As President Obama recently reminded the nation, "[t]his is no idle

danger, no hypothetical threat. In the last few months alone, we have apprehended extremists within our borders who were sent here from the border region of Afghanistan and Pakistan to commit new acts of terror." President Barack Obama, Remarks to the Nation on the Way Forward in Afghanistan & Pakistan (Dec. 1, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan.

In the end, then, this case is not one where individual liberty and national security are at odds. Federal practice includes established mechanisms to protect First Amendment interests on an as-applied basis within an individual prosecution, and the Executive Branch has created additional safeguards to ensure respect for protected speech. It is only the Ninth Circuit's decision that fails without constitutional justification to respect the balance between liberty and security by invalidating essential aspects of a critical counterterrorism tool regularly relied upon by the Department of Justice.

CONCLUSION

For these reasons, and those articulated in the Solicitor General's brief, this Court should reverse in part the Ninth Circuit and hold that Section 2339B is neither vague nor overbroad.

Dated: December 28, 2009 Respectfully Submitted,

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